

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Second Periodic Review of the	)	MB Docket No. 03-15
Commission's Rules and Policies)	
Affecting the Conversion to	)	RM 9832
Digital Television)	
)	
Public Interest Obligations of TV	)	MM Docket No. 99-360
Broadcast Licensees)	
)	
Children's Television Obligations of	)	MM Docket No. 00-167
Digital Television Broadcasters)	
)	
Standardized and Enhanced Disclosure	)	MM Docket No. 00-168
Requirements for Television Broadcast)	
Licensee Public Interest Obligations)	

To: the Commission

RESPONSE TO COMMENTS ON
NOTICE OF PROPOSED RULEMAKING

CAVALIER GROUP, LLC
R. Nash Neyland
2679 Crane Ridge Drive
Suite C
Jackson, MS 39216
(601) 420-7029

Dated: May 21, 2003

TABLE OF CONTENTS

<u>SUMMARY</u>	i
<u>I. INTRODUCTION AND STATEMENT OF INTEREST</u>	2
<u>II. THE 700 MHz CLEARING PLAN</u>	2
<u>A. Pending Applications Dismissed or Deferred</u>	3
<u>B. Out-of-Core DTV Channels Reclaimed – Flash Convert</u>	3
<u>C. Relocate Out-of-Core Analog Stations – Flash Convert</u>	4
<u>D. In-Core DTV Channels</u>	4
<u>E. Fund Established to provide Relocation Assistance</u>	5
<u>F. Justification for 700 MHz Clearing Plan</u>	6
<u>(1) Plan Allows Consumer Demand to Drive Transition</u>	6
<u>(2) Plan Address Many of the Broadcast Industry’s Concerns</u>	6
<u>(3) There is Sufficient Critical Mass to Drive Transition Forward</u>	8
<u>(4) The Plan is More Efficient Method to Clear 700 MHz Band</u>	9
<u>(5) Plan Would Encourage Participation in New Auctions</u>	10
<u>(6) Plan Would Reduce FCC Burdens</u>	11
<u>(7) Plan Promotes Efficient Use of Spectrum</u>	11
<u>(8) Inaction Only Perpetuates Financial Burden and Risk</u>	12
<u>III. SPECIFIC RESPONSES ON CRITICAL ISSUES</u>	13
<u>A. Interpretation of Section 309(j)(14)</u>	13
<u>(1) General</u>	13
<u>(2) Converter Availability</u>	13
<u>(3) Converter Reception Capability</u>	14
<u>(4) Television Market</u>	14
<u>(5) 85% Test - Downconversion</u>	15
<u>(6) 85% Test – MVPD Penetration</u>	17
<u>B. Channel Election</u>	18
<u>C. Replication and Maximization</u>	19
<u>D. Simulcasting</u>	20
<u>IV. CONCLUSION</u>	21

SUMMARY

The DTV Transition is not proceeding as fast as the FCC, Congress or the broadcast industry anticipated, or even as fast as the broadcast industry would have us believe. The original “industry wide” plan for **all** broadcast stations to participate in the DTV Transition by constructing and operating their own separate digital facility on a second 6 MHz channel is not working well which at the same time subjecting a vast majority of the nation’s broadcast stations to significant financial pressure. The financial pressure not only threatens competition within the broadcast industry as a whole, but also threatens the preservation of free, universally available, local broadcast television in a digital world. Analog stations, particularly the smaller stations, may “go dark” or elect to sell out to the media conglomerates in order to avoid operating a separate digital station that would be virtually guaranteed to lose money for no telling how many years into the future, thus further consolidating the broadcast industry into the hands of an increasingly small number of participants.

Delaying critical deadlines, deferring critical decisions and allowing reduced digital operations, as requested by many entities within the broadcast industry, neither promotes the DTV Transition nor effectively addresses the severe financial pressure the DTV Transition is having on a significant number of the nation’s television stations. Furthermore, they do absolutely nothing to promote the efficient use or rapid return of spectrum. If the FCC elects to continue with the current “industry-wide participation” structure of the DTV Transition, then it must expedite deadlines and enforce real “use it or lose it” penalties on those stations which cannot or will not fully utilize their digital allotments to promote consumer adoption of digital television. Otherwise the financial drain will remain wide open and the DTV Transition will continue to drag along well into

the future during which time a significant band of valuable spectrum remain unused or underutilized.

On the other hand, changes to the structure of the DTV Transition can and should be made NOW that would promote the DTV Transition, protect the vast majority of the nation's stations from potential financial ruin, *and* clear the 700MHz band spectrum by the end of 2006 in an efficient and equitable manner. It makes little sense, we believe, to allow the 700 MHz band spectrum to remain dormant or underutilized on a nationwide basis until such time as 85% of the television households in the nation have digital capability. Instead, the FCC should take steps to clear the 700 MHz band of television incumbency by the end of 2006 and allow the DTV Transition to proceed on the in-core channels at whatever pace is driven by consumer demand. This can be accomplished in a manner that addresses the financial issues raised in many comments submitted by the broadcast industry, such as allowing flash conversion to digital, and also addresses the needs of public service interests and new 700 MHz licensees for cleared spectrum to provide new services to consumers. Finally, clearing the 700 MHz band would also significantly reduce Congressional and other pressure to expedite the DTV Transition process because the 700 MHz band would be cleared by administrative action.

Absent FCC or Congressional action that clears the 700 MHz band prior to the end of the DTV Transition, the FCC must interpret Section 309(j)(14) in a manner that not only recognizes Congressional concern with television households losing the ability to view television over the air, but also the Congressional concern and intent for reclamation and re-auction of spectrum. No interpretation of the statute is valid if it renders it virtually impossible to meet the statutory goal to reclaim spectrum. No interpretation is valid if manipulation can be used to frustrate the purpose of the statute.

No interpretation is valid if it leads to unrealistic results, such as could arise if “television market” is defined to mean a DMA whereby a station could have 100% digital penetration over the geographic area it covers with its programming signal, but extend the transition because television households which cannot even receive its programming signal over-the-air do not have digital television sets or converters.

The truth of the matter is, if the FCC takes actions to clear the 700 MHz band, then issues regarding the interpretation of Section 309 can be deferred to a much later date. If the 700 MHz band is cleared, the FCC and broadcaster industry can take however long is necessary to craft as just an equitable post-transition “repacking” plan as can be crafted. If actions are taken to clear the 700 MHz band by the end of 2006, the FCC and Congress can expect higher bid prices in auctions of 700 MHz spectrum as well as the development and deployment of new wireless services over spectrum which is now substantially unused or underutilized. Spectrum is a national resource and it is an abdication of the public trust to allow spectrum to remain unutilized or underutilized.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Second Periodic Review of the	)	MB Docket No. 03-15
Commission's Rules and Policies)	
Affecting the Conversion to	)	RM 9832
Digital Television)	
)	
Public Interest Obligations of TV	)	MM Docket No. 99-360
Broadcast Licensees)	
)	
Children's Television Obligations of	)	MM Docket No. 00-167
Digital Television Broadcasters)	
)	
Standardized and Enhanced Disclosure	)	MM Docket No. 00-168
Requirements for Television Broadcast)	
Licensee Public Interest Obligations)	

To: The Commission

RESPONSE TO COMMENTS ON
NOTICE OF PROPOSED RULEMAKING

CAVALIER GROUP, LLC
R. Nash Neyland
2679 Crane Ridge Drive
Suite C
Jackson, MS 39216
(601) 420-7029

Dated: May 21, 2003

I. INTRODUCTION AND STATEMENT OF INTEREST

Cavalier Group, LLC (“Cavalier”) is the holder of licenses in the Lower 700 MHz band acquired in FCC Auction #44, and will be a participant in FCC Auction # 49 scheduled to begin later this month. The licenses Cavalier has acquired cover both rural and urban areas, many of which are currently encumbered by analog and digital television stations which have been built and are operating. In other cases DTV allotments have been granted on such channels in our licensed markets but digital facilities have not been constructed (or if constructed, are operating at the bare minimum currently required levels). As such, Cavalier has a direct interest in these proceedings.

II. THE 700 MHz CLEARING PLAN

In our initial comments in these proceedings Cavalier proposed a potential course of action which we referred to as the “Clearing Option” in which out-of-core stations would be given an *option* to give up one of their 6 MHz channels and move in-core. After considering the Comments submitted by other interested parties, we believe that as a matter of public policy and for the protection of the entire broadcast industry, the FCC should take action now that *requires* the clearing of the 700 MHz band spectrum and relieves the financial pressures on a vast majority of the broadcast stations across the nation. As a matter of public policy the 700 MHz band spectrum needs to be cleared for critical public safety needs and for the provision of new digital services by entities such as Cavalier. Given the glacially slow pace of the DTV Transition thus far, it is in the best interests of the public to find a way to clear the 700 MHz band prior to the time 85% of the television households in the nation have digital televisions capabilities. The FCC has

recognized its authority to reclaim and reallocate spectrum for public policy reasons.¹ Piecemeal clearing through negotiated arrangements will not efficiently clear the spectrum on a nationwide basis and may result in significant portions of the spectrum remaining dormant to both digital television services and new digital broadband services for a significant period of time. As such, we propose that the FCC consider the following 700 MHz Clearing Plan.

A. Pending Applications Dismissed or Deferred.

- Pending applications for out-of-core DTV channels should be dismissed. At this stage there is no reason to grant an out-of-core DTV channel to any station.
- Pending applications for in-core DTV channels should be deferred until after in-core stations have had the opportunity to forfeit their in-core DTV channels.

B. Out-of-Core DTV Channels Reclaimed – Flash Convert.

- Out-of-core DTV channels should be reclaimed from stations which have not yet constructed digital facilities. It is highly unlikely that any of these stations will ever construct and fully operate digital facilities on out-of-core channels, and it most likely would be financially inefficient for them to do so. In the meantime the allocated DTV channels for the large part remain dormant.
- Out-of-core DTV channels should be reclaimed from stations which have constructed digital facilities but which are not operating at full power, with full replication and with substantial hours of digital programming by December 31,

¹ See, In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, July 28, 1995, at footnote 30 (recognizing ample precedent for FCC decision to reallocate spectrum in the public interest).

2003. Even if such stations do elect to broadcast digital programming at full power they should be relocated to an in-core channel by the end of 2006.

- Full power out-of-core digital stations should be allowed to terminate digital operations and flash convert to digital on the in-core channel at their election, but the out-of-core channel should be reclaimed by December 31, 2006.

C. Relocate Out-of-Core Analog Stations – Flash Convert.

- Out-of-core analog stations should be required to relocate to an in-core channel on or prior to December 31, 2006. It is highly likely that numerous in-core channels would be cleared under this Plan long prior to the end of 2006 to make way for the relocation of out-of-core analog stations and out-of-core digital stations which want to continue digital operations via a separate facility (if any). Such stations should be given first priority to in-core channels cleared or forfeited by in-core stations and allowed to flash convert to digital on their in-core at anytime.

D. In-Core DTV Channels

- DTV channels for stations with in-core digital channels but for which digital facilities have not been constructed by June 1, 2003 should be reclaimed. Either these stations cannot afford to construct and fully operate digital facilities on the in-core DTV channel or they are facing material non-financial difficulties in doing so. To allow such stations to hold the in-core spectrum hostage, or to allow them to build and operate digital facilities on the in-core DTV channel at low power, would promote inefficient use of spectrum, impede an orderly and efficient clearing of the 700 MHz band, and virtually guarantees that the stations will continue to request further extensions and relaxed operating parameters.

- Other than with respect to the Top Four stations and their affiliates (and possibly the top 6 network stations and their affiliates) in the top 100 markets, stations with in-core DTV channels which have constructed should be allowed to relinquish their DTV channel and flash convert to digital on their in-core analog channel at anytime prior to the end of the DTV Transition. This would be especially true for smaller stations which demonstrate significant financial pressure from operating two stations and the smaller stations in the top 100 markets. However, such elections should be made no later than December 31, 2003. An open end “election termination date” would only drag the process out and delay the FCC’s ability to relocate out-of-core stations to in-core channels. Any station qualifying to forfeit one of its in-core channels but which elects to retain both its analog and DTV channel should be required to operate at least at such minimum power as is necessary to provide a digital programming signal to a substantial portion of the television households in its market.

E. Fund Established to provide Relocation Assistance

The FCC should establish a fund from proceeds of subsequent 700 MHz auctions to provide financial assistance to out-of-core stations which are relocated to in-core channels as well as to assist low income consumers in acquiring converters. The FCC should consider other incentives for out-of-core stations to relocate prior to the end of 2006, such as greater must carry rights or the ability to use in-core low power affiliates to protect the analog television household in their markets.

F. Justification for 700 MHz Clearing Plan

(1) Plan Allows Consumer Demand to Drive Transition.

A substantial amount of Congressional and other pressure to push the DTV Transition forward would be eliminated with the adoption of the 700 MHz Clearing Plan because, if adopted, the entire 700 MHz band would be cleared by the end of 2006. That would allow the DTV Transition to continue on the in-core channels at whatever pace was driven by consumer demand. And that is really what the broadcast industry is asking for anyway – let consumer demand drive digital programming instead of requiring digital programming to drive consumer demand, as originally intended. We believe that a market driven transition makes sense at this time under the circumstances, *but only if coupled with the clearing of the 700 MHz band.* It is good public policy to protect the financial health of the nation's broadcast stations. It is good public policy to promote efficient use of spectrum. It would be poor public policy to allow stations to retain a free 6 MHz channel and not use it, or use it at low power and with reduced hours of operation. If stations are going to retain their free 6 MHz digital channel, then they must be required to utilize that channel fully to promote the DTV Transition, or relinquish it.

(2) Plan Address Many of the Broadcast Industry's Concerns.

The Plan addresses many of the concerns expressed by broadcast stations and their representative interests concerning the financial problems created by the DTV Transition and the industry's alleged need for additional time and guidance from the FCC on a host of matters. There is no question but that the current DTV Transition process is creating a severe financial burden on the vast majority of the nation's broadcast stations. Given the opportunity to "flash convert" at a later date, it is likely that a significant

number of the nation's broadcast stations would relinquish their DTV channel so that they do would not have to broadcast digital programming to a small and vanishing over-the-air market. This should be particularly true of the stations with out-of-core DTV allotments². The forfeiture of a significant number of unused or underused DTV channels would help clear the 700 MHz band and make room within the in-core channels for out-of-core stations to relocate.

Extending critical deadlines, such as those for channel election, replication and maximization, and relaxing operating parameters, such as reducing required hours of digital operation, will not promote the DTV transition or reduce the financial burden of the transition. Instead they prolong the DTV Transition and spread the financial nightmare over a greater number of stations. The fact is, even those digital stations operating at reduced power are losing money and have little or no additional income from digital operations to offset costs of operations. There is virtually no reason to believe that a station which could not afford to construct digital facilities by today, even reduced power facilities which may cost as little as \$50,000 or as much as \$2 million,³ would be able to do so at a reasonably foreseeable later date. There is also little reason to believe that a station losing money now with low power operations will be able to afford

² See, e.g., Comments of Paxson Communications Corp. We disagree with Paxson that the FCC should not require a relinquishment of an out-of-core DTV channel if the station elects to "flash convert" on the in-core digital channel. Paxson's arguments are nothing but a thinly veiled attempt to (i) avoid its obligation to assist in promoting consumer demand for digital, and (ii) profit from the sale of its licenses for 6 MHz digital channels given to it free of charge based on its agreement to build and operate digital facilities on the free channels. For the FCC to allow that to happen would definitely be an abdication of the public trust. If Paxson or any other station (other than a major "Top Four" station) wants to flash convert on an in-core channel at a later date, they should be allowed to do so but the compensation for such right must be the relinquishment of one of its free channels. If, on the other hand, such a station elects to maintain its DTV channel, then it should be required to provide proof of financial ability to build and operate digital facilities (if not already built) and it must be required operate its digital facilities at full power, replicating at least the DTV allotted geographic area, and with significant hours of popular and specialty programming. In short, if a station is going to keep its second DTV channel, then that station must be required to use it as originally anticipated.

the significant costs to upgrade to full power at a later date. To continue to place such a heavy financial and managerial burden on a significant portion of the nation's broadcast stations not only promotes the inefficient use of spectrum, it also threatens the viability of broadcast television.⁴ Low income and rural area consumers would be at less risk of losing even analog service since the financial hardship on rural, satellite and low power stations faced with operating two stations would not create an incentive to either convert to digital early, terminate operations altogether, or sell out to a bigger station or group.

(3) There is Sufficient Critical Mass to Drive Transition Forward.

We believe that sufficient "critical mass" of digital broadcasting may be in place at this time with the Top Four networks and their affiliates (or maybe the top 6) to continue to drive consumer demand for over-the-air digital broadcasting. Comments of various consumer electronic equipment manufacturers demonstrate that prices for digital equipment is falling with the current level of digital broadcasting (some of which they allege is not reaching consumers in the first place), and would likely continue to fall as consumer demand for digital television increases and the cable companies and major digital stations increase the amount of digital programming they provide.

In fact, based on MVPD penetration levels, the main thing that is needed to drive consumer demand for digital television is dual must carry. Requiring small stations to provide a digital programming signal to their markets is probably not likely to have a real impact on consumer adoption of digital television, especially if the stations are allowed to operate at low power and/or with reduced hours of digital operations. So but for the major stations which have been asked to drive the DTV Transition, stations should be

³ See, "Get With The DTV Program," Broadcasting and Cable, April 21, 2003, p.42.

allowed to give up their digital channel and flash convert to digital at a later date. It makes no sense to require the smaller stations to lose money broadcasting a digital signal to a statistically insignificant market. It also makes no sense to allow a station to continue to hold on to a free 6 MHz DTV channel if they are not going to fully utilize it to promote the transition.

(4) The Plan is More Efficient Method to Clear 700 MHz Band.

While band-clearing arrangements could be used to clear the 700 MHz band spectrum, the proposed Plan is a more equitable and efficient alternative that more broadly addresses the needs of the broadcast industry as a whole. The Plan would (i) clear the 700 MHz band on a nationwide basis by the end of 2006, (ii) reduce the financial burdens the DTV Transition is exacting on a vast majority of the nation's broadcast stations, (iii) potentially increase the number of participants in future FCC auctions of 700 MHz spectrum, and (iv) increase the prices at which the FCC and Congress could expect to receive from the auction of the remaining 700 MHz spectrum.

Piecemeal, negotiated band-clearing arrangements would take a longer period of time to bring to fruition thereby guaranteeing that significant portions of the 700 MHz band spectrum would remain fallow for longer than necessary. Stations holding licenses for out-of-core spectrum would be prone to hold-out for higher "clearing prices" as the markets around them were cleared, especially if the stations are not required to construct and operate their digital facilities at full power as intended. Piecemeal arrangements would not be equitable in all markets and to all stations as all licensees of 700 MHz spectrum will not have the same financial resources. Furthermore, and probably most

⁴ See, e.g., Comments of Media General Communications, Inc.

important from a public policy viewpoint, the out-of-core DTV channels were awarded to certain stations for *free* based on those stations' obligation to construct and operate digital facilities in order to drive consumer demand for digital programming. It would definitely be an abdication of the public trust for the FCC to foster a situation whereby a station with an out-of-core DTV channel can do basically nothing to promote the DTV Transition, yet benefit financially from the subsequent "sale" of its free DTV channel. This is even more pertinent when the out-of-core DTV channel is one allocated to public safety. Spectrum is a national resource, the financial benefits of which should inure to the benefit of the nation as a whole, not just those certain individual entities which acquired the spectrum rights free of charge.

(5) Plan Would Encourage Participation in New Auctions.

One need only consider the list of participants in Auction # 44 and those signed up to participate in Auction #49 to realize that it is a fact that so long as the television incumbency cloud covers the 700 MHz band, the major telecommunications companies and multi-million dollar media interests will probably not participate in auctions for 700 MHz band licenses. In addition, the prices bid for 700 MHz band licenses will most likely remain significantly less than prices bid for PCS and other spectrum let for bid in other FCC auctions and prices paid in open market transactions. It would be sound public policy for the FCC to take action now that would certify to the market that the 700 MHz band will be cleared of television incumbency by the end of 2006 before auctioning any 700 MHz band spectrum other than that in FCC Auction #49. Once definitive steps are taken by the FCC that ensures the clearing of the 700 MHz band spectrum by the end

of 2006, the big telecommunication companies and the major media interests may be more interested in participating in auctions of the 700 MHz band spectrum since they will not be effectively faced with purchasing their spectrum rights twice – once from the FCC and then again from a television station which acquired the spectrum free of charge in the first place.

(6) Plan Would Reduce FCC Burdens.

Adoption of the 700 MHz Clearing Plan, or something similar thereto, would substantially reduce the FCC's burden associated with the implementation of Section 309(j)(14). Based on the Comments reviewed, it is certainly likely that a substantial number of broadcast stations would forfeit their DTV channels in order to avoid financial ruin, so there would be a substantially reduced number of stations which would be required to give up one channel when the DTV Transition did come to an end. Furthermore, the FCC and broadcast stations would not be forced to review and prove such things as digital penetration levels at the end of 2006 because the 700 MHz would be cleared by that date. Such reviews could be put off to a later date when digital penetration has substantially increased. In Cavalier's opinion, the plain language of Section 309(j)(14) does not allow a "blanket" extension of the DTV Transition. First, a station must request the extension and second, at least with respect to the "converter availability" test and the "digital penetration" test, the FCC must examine the market of the station requesting the extension.

(7) Plan Promotes Efficient Use of Spectrum.

As it currently stands, a vast majority of spectrum allocated for DTV remains unused or underused with little hopes of substantial improvement in the near future. As

of March 12, 2003⁵, only 334 of the 1,315 commercial DTV channels were occupied by stations operating at full power. 460 digital channels were occupied by stations operating at reduced power. Over one third of the commercial DTV channels are not being used at all! While some stations⁶ operating at reduced power may be providing a digital programming signal to a majority of the television households in their market areas, such is certainly not the case with all of the reduced power stations⁷. So reduced power stations still lose money and in many instances may do virtually nothing to promote consumer demand for digital television.

(8) Inaction Only Perpetuates Financial Burden and Risk.

The FCC should not wait until a later date to put into place a plan of action that addresses the critical financial concerns of the broadcast industry and the significant public policy goals of efficient use of spectrum. The return of a contiguous block of spectrum (the 700 MHz band) on a nationwide basis is of significant concern to both the FCC and Congress. In fact, it is one of the two essential goals of the entire DTV Transition process. A review of the legislative history of the Congressional decision not to require an auction of the separate 6 MHz channels to broadcast stations for the DTV Transition clearly validates this fact. There is still sufficient time between now and the end of 2006 for the FCC to take actions that would guarantee a nationwide clearing of the 700 MHz band spectrum in a manner that benefits all interested parties. But to delay will

⁵ See, "Get With The DTV Program," Broadcasting and Cable, April 21, 2003, p.42.

⁶ See, e.g., Comments of Cordillera Communications, Inc. ("Cordillera Comments") regarding their signal coverage for certain stations at low power. If the FCC is to continue to allow stations to operate at low power, then each such station should be required to provide independent evidence of digital signal coverage, similar to that provided by Cordillera, with regular subsequent re-certifications.

⁷ See, e.g., Comments of Thompson, Inc. ("Thompson Comments") regarding penetration of low power digital signals into suburban areas and related quote of Nat Ostroff of Sinclair Broadcast Group, pp 6 and 7.

only increase losses to the nation's stations while doing little if anything to increase consumer demand for digital television.

III. SPECIFIC RESPONSES ON CRITICAL ISSUES

If the FCC does not take this opportunity to adopt something akin to the 700 MHz Clearing Plan, then it must not allow the entire DTV Transition to be extended by adopting proposals of the broadcast industry seeking to defer critical decisions and extend critical deadlines. Instead, the FCC should expedite deadlines and enforce rules designed to reclaim unused and underused spectrum. Section 309(j)(14) must be interpreted in a manner that will give effect to Congressional intent which is not only to protect analog television households, but also to reclaim the spectrum. No interpretation of Section 309(j)(14) is valid if the interpretation opens the door for manipulation by the very parties who are being required to give back the spectrum, or if the interpretation leads to obviously unintended results. Cavalier's following responses to Comments of various third parties in these proceedings are intended to address the issues raised only if the FCC does not take action that would result in the clearing of the 700 MHz band.

A. Interpretation of Section 309(j)(14).

(1) General.

The protection of analog households was not the sole purpose and intent of Section 309(j)(14). Reclamation of spectrum is also a clearly established goal of the Section.

(2) Converter Availability.

The statute clearly requires the FCC to determine if converters are "generally available" in a market. It does not say "universally available" and it contains no language

to reflect any Congressional intent regarding the prices at which the converters were available. The impact of pricing on converters would be captured in the 85% digital penetration test. However, we support the Comments of Civil Rights Organizations that the FCC should establish a fund to assist qualifying low income households in acquiring converters.

(3) Converter Reception Capability.

Any converter that is capable of converting the minimally required digital signal should be counted. Efforts to limit inclusion of households only to those which have converters capable of converting **all** digital programming signals is tantamount to requiring all converters to be HDTV converters. All digital sets do not have to be HDTV sets, so why should the converters have to be HDTV? Furthermore, requiring converters to be able to convert HDTV signals would unnecessarily increase the prices at which converters would be available and would limit consumer choices. The higher the prices of converters the less likely that they would be affordable by many Americans and, therefore, the longer the DTV Transition drags on. Absent a compelling reason, the FCC should not interpret terms and phrases in this section that would unnecessarily extend the DTV Transition.

(4) Television Market.

The only rational interpretation of “television market” is the NTSC Grade B service contour of the station, and even that should be reduced to the area that the station has covered with a digital signal prior to the end of the DTV Transition. Any DMA based interpretation is overly broad and could easily lead to results directly contrary to the purpose of the statute. For example, with the DMA based definition a station could

have 100% digital penetration in the area over which it provides a digital signal but still extend the transition just because television households located outside of its area of digital signal coverage do not have digital capabilities. It does not make sense that a station should be able to extend the transition and retain one of its free 6 MHz channels just because households to which it did never provide an over-the-air signal could not pick-up over the air signals.

Using a DMA based definition would also have the result of extending the DTV Transition over an area larger than necessary to protect a station's over-the-air viewing public and, therefore, would be overbroad and unnecessary. In fact, using a DMA based definition would extend the "television market" over an area which in many cases would be much larger than the area in which the station had "must carry" rights. Finally, arguments that one interpretation should be favored over another due to administrative efficiency have no basis. The reclamation of valuable spectrum from stations which did not pay for it in the first place is far too important to allow administrative efficiency to guide interpretations of key statutory words and phrases. Administrative efficiency was a significant factor in the decision not to require stations to prove financial ability to construct and operate digital facilities as a condition precedent to the grant of a separate 6 MHz channel, and we can see what impact that decision has had on the progress of the transition.

(5) 85% Test - Downconversion.

The goal of the 85% test is to ensure that before a station would be required to give up one of its two 6 MHz channels and convert to all digital broadcasting, at least 85% of the television households in that station's market must be able to watch the same

television programming after the transition that it could watch prior to the transition. The statute does not require that 85% of the television households in the market have the ability to pick up digital signals over-the-air, and certainly not that 85% of the televisions in the market are digital sets. Congress clearly anticipated that at the end of the transition television households would still have analog sets, otherwise why acknowledge converters as an alternative to digital sets? Comments against counting television households in the 85% tranch which receive downconverted digital signals have no basis. Why should the location of the device that converts the digital signal to analog matter?

Rest assured that the cable industry is at least equally as concerned with the analog sets in their customer households as the broadcast industry is concerned about the analog sets of the small and vanishing number of over-the-air television households in the geographic areas over which they provide a programming signal. If a cable company does not provide programming that its analog customers can watch, regardless of whether or not the programming is from a local broadcast station, the cable company loses money through customer cancellations. Cable and other MVPDs have a much greater market incentive to protect the analog households than the broadcasters, so any fears or concerns that the MVPDs would terminate downconversion and convert to all digital thereby disenfranchising a significant number of their paying customers is baseless. Furthermore, downconversion at the cable headend may be the cheapest way to protect low income and elderly consumers, as well as those television households for which an analog picture and sound is just fine with them.

(6) 85% Test – MVPD Penetration.

It is unreasonable and contrary to the clear intent of the statute to interpret Section 309(j)(14)(B)(iii) in a manner that would guarantee extensions in any market where there was not at least 85% MVPD penetration. Where in the legislative history of the section, or the entire Congressional proceedings leading to the enactment of Section 309(j)(14), is there any indication that Congress intended to promote MVPD penetration or limit the return of spectrum from broadcasters based on MVPD penetration levels? In fact, one of the reasons for the push to convert the broadcast industry from analog to digital broadcasting is to make broadcast television more competitive with cable and other MVPD providers. If digital broadcasting proves to create competition to the MVPD industry, then one would expect MVPD penetration levels to decline as more television households “cut the cable” and utilized over-the-air broadcast television. So if the statute is interpreted to first require 85% MVPD penetration, then the greater the success and adoption of digital broadcasting the less likely that the broadcast industry would ever return spectrum. Such a result is absolutely contrary to the intent of Congress.

An additional unreasonable result of such an interpretation would arise in that a station could have 100% digital penetration within the area of its digital signal coverage (or even within the entire DMA) but still extend the transition because MVPD penetration was not at least 85%. That too is directly contrary to clear Congressional intent and would, therefore, be an unreasonable and unsupportable interpretation.

The FCC should not read literally the conjunctive “and” at the end of Section 309(j)(14)(B)(iii)(I). Instead, the FCC should interpret the entire statutory subsection as a whole and in a manner which recognizes and gives effect to the clear Congressional

intent that regardless of how many sets it took, a television household would not be included in the 15% tranch if after the transition it would still “receive at least one programming signal from each *local* television station broadcasting a digital television service signal.”⁸ As such, a television household which has at least one set connected to a MVPD which carries at least one of the programming signals of each of the “local” television stations would be included in the 85% “digital” tranch regardless of MVPD penetration. Furthermore, a television household which has at least one set connected to a MVPD which carries, for example, 9 of the 10 local television stations’ programming signals, and another set capable of picking up the programming signal of the station which was not carried by the MVPD would also be included in the 85% “digital” tranch regardless of MVPD penetration. No rationale argument can be made why these television households should not be counted in the 85% digital tranch given the purpose of the statute.

An interpretation in the manner we propose would prevent easy manipulation by denial of retransmission consent. If the denying broadcast station is “local” and broadcasts a digital signal to a television household that had a converter or digital set, and if the same household had the ability to see the other local broadcast station programming signals via one or more MVPD providers, that household would be unaffected by the conversion to all digital. In turn such an interpretation would eliminate the ability of a station to manipulate and frustrate the purpose of the statute by denying retransmission consent. No station should be allowed an extension just because a television household

⁸ Balanced Budget Act of 1997, 105th Cong., 1st Sess. Conf. Rep. 105-217, 577 (1977)(emphasis added). The reference to “local” television stations introduces the concept of “localism” discussed in *WLNY-TV, Inc. v. FCC*, 163 F. 3rd 137(2nd Cir. 1998) and is further evidence that a DMA based definition of

in its market to which it is not providing a digital programming signal over the air cannot pick up that signal.

B. Channel Election.

We support all comments in favor of expediting Channel Election, especially for stations that have already been built and operating for at least three years and for stations in the top 100 markets. At the very least Channel Elections must be expedited in the markets where there are full power out-of-core stations in operation, as suggested by WLNY-TV Inc. Furthermore, we would observe that channel elections made by those stations which are fully operating digital facilities (and therefore bearing the burden of the DTV Transition) should not be subject to protest by other stations if operations on the elected channel do not result in impermissible interference. There is no equity in prohibiting the very stations which drive the DTV Transition their valid channel election.

C. Replication and Maximization.

If all digital stations operating at low power covered at least 90% of the television households in their markets with digital signals, then there might be a good argument to extend the replication and maximization deadlines. But comments submitted demonstrate that such is not the case. Replication and maximization should be expedited in the top 100 markets as these are the markets with the greatest congestion and the highest population bases. If, as alleged in the NAB Comments, additional time is needed to plan and test for unintended interference and a host of other problems, then the best place to start is in the very markets where the problems are more likely to develop. This

“television market” is overbroad. Some stations may be located within a DMA but not “local” to a particular area or portion of the DMA.

cannot be pushed off to a later date. The longer it gets pushed back the longer the overall transition will last.

D. Simulcasting.

We support industry arguments to reduce actual simulcasting, with some qualifications. If the DTV Transition is to move forward, hours of digital programming must be increased and quality digital programming should be required. Simulcasting was intended to guarantee that a station's "popular" analog programming would also be available on the digital channel. To that end, we believe that stations should be required to broadcast in digital format their prime time analog programming, with such digital broadcast being made prior to or simultaneous with the analog broadcast. Furthermore, the digital programming must be quality programming. In other words, no station should be allowed to broadcast the same programs multiple times daily just to meet minimum hours of operation requirements. We would also note that early in these proceedings stations argued that they should not be required to construct and operate separate digital facilities, but should be allowed to flash convert to digital at a later date. One of the reasons for denying such requests was that flash conversion would undermine a station's simulcast obligations.⁹ If the FCC reduces station's simulcast obligations then there is even more reason to allow a station to flash convert to digital at a later date, so long as they relinquish one of their channels.

⁹ See, In the Matter of Advanced Television Systems and Their Impact upon the Existing Broadcast Service, MM Docket No 87-268, Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, February 17, 1998 at para. 78 (FCC even then recognized that it could revisit the decision in subsequent biennial reviews).

IV. CONCLUSION

The FCC should use the opportunity of these proceedings to take definitive actions that would clear the 700 MHz band spectrum on a nationwide and equitable basis by December 31, 2006 while at the same time promoting the DTV Transition and protecting the vast majority of the nation's stations from potential financial ruin. Extending deadlines and deferring decisions will not (i) render digital operations for a vast majority of the nation's broadcast stations financially justifiable anytime in the near future or (ii) guarantee that strong digital signals carrying popular or compelling programs will even get to the consumers in many of the digital station markets. It does absolutely nothing to promote the rapid recovery of valuable spectrum.

Respectfully submitted

CAVALIER GROUP, LLC.

/S/ R. Nash Neyland
R. Nash Neyland